FLORIDA DEPARTMENT OF BUSINESS REGULATION and Robert Butterworth, Plaintiffs-Appellants,

v.

ZACHY'S WINE AND LIQUOR, INC., et al., Defendants,
Rochambeau Wines and Liquors, Inc., et al., Defendants-Appellees.

No. 96-2772.

United States Court of Appeals,
Eleventh Circuit.

Oct. 24, 1997.

State brought action seeking to enjoin four out-of-state, mail-order wine distributors from violating state's liquor laws. The United States District Court for the Northern District of Florida, No. 95-40462-WS, William Stafford, J., dismissed for lack of subject matter jurisdiction, and state appealed. The Court of Appeals, Dubina, Circuit Judge, held that Webb-Kenyon Act, which prohibits shipment or transportation of liquor into state if liquor is intended to be received, possessed, sold, or otherwise used in violation of receiving state's law, does not provide states with implied federal cause of action.

Affirmed.

Eric J. Taylor, Department of Legal Affairs, Tallahassee, FL, Thomas A. Klein, Denis Dean, Tallahassee, FL, for Plaintiffs-Appellants.

Roy C. Young, Tallahassee, FL, Robert T. Wright, Jonathan Cohen, David S. Goldstein, Shutts & Bowen, Miami, FL, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, Miami, FL, for Defendants-Appellees.

Mark B. Stern, John S. Koppel, U.S. Department of Justice, Appellate Staff, Civil Division, Washington, DC, for Amicus USA.

Appeal from the United States District Court for the Northern District of Florida.

Before ANDERSON, DUBINA and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

The State of Florida ("State") brought an action seeking to enjoin four out-of-state, mail-order wine distributors from

violating Florida's liquor laws, Fla. Stat. Ann. § 561 et seq. The district court dismissed the complaint for lack of subject matter jurisdiction. We affirm.

I. STATEMENT OF THE CASE

Defendants/appellees ("defendants") are four out-of-state[1]/ wine retailers who solicit direct mail-order business from Florida residents. The State contends that this practice violates Florida's Beverage Laws, Fla. Stat. Ann. § 561 et seq. Those laws provide that alcoholic beverages imported into Florida must be shipped to a licensed, in-state manufacturer or distributor and may be sold only by licensed, in-state vendors. Fla. Stat. Ann. §§ 561.14, 561.54, 561.57. The Florida Division of Alcoholic Beverages and Tobacco notified defendants of the alleged violations, but defendants did not alter their business practices.

The State filed a five-count complaint against defendants seeking an injunction compelling defendants to comply with the licensing requirements of the Florida Beverage Laws. The State also alleged state law claims for payment of

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[1]/ Three of the defendants are located in California; one is located in New York.

unpaid excise taxes, sales taxes, and license fees. The State invoked jurisdiction under 28 U.S.C. § 1331, which provides that district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, and 28 U.S.C. § 1337, which provides that district courts shall have jurisdiction over actions arising under acts of Congress regulating commerce. Specifically, the State claimed that its federal claim arose under the Twenty-first Amendment, the Wilson Act, 27 U.S.C. § 121, and/or the Webb-Kenyon Act, 27 U.S.C. § 122. The State contended that the district court had supplemental jurisdiction over the Florida state law claims pursuant to 28 U.S.C. § 1367(a).

Defendants moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion, finding that neither the Twenty-first Amendment, the Wilson Act, nor the Webb-Kenyon Act supplied a federal right of action for failure to comply with state liquor laws. In the absence of a federal claim, the district court concluded that it lacked subject matter jurisdiction to hear the case. The State then perfected this appeal.[2/]

[2/] In addition to the parties' briefs, we have the benefit of an amicus brief from the United States and an

On appeal the State argues that the Webb-Kenyon Act provides the State with a federal cause of action to enjoin the direct shipment of alcoholic beverages to Florida residents by out-of-state distributors in violation of state liquor laws. The State abandons its reliance on the Twenty-first Amendment and the Wilson Act.

II. DISCUSSION

A. Background of the Webb-Kenyon Act

"Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states." Castlewood Int'l Corp. v. Simon, 596 F.2d 638, 641 (5th Cir.1979). In The License Cases, 46 U.S. (5 How.) 504, 579, 12 L.Ed. 256 (1847), the Supreme Court recognized broad state authority to regulate alcohol, noting that states were free from the implied restrictions of the Commerce Clause. U.S. Const. art.I, § 8, cl.3. In 1890, however, the Court struck down an Iowa law regulating the sale of liquor shipped from out-of-state. Leisy v. Hardin, 135 U.S.

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amicus brief from the National Alcohol Beverage Control Association, Inc., and the National Conference of State Liquor Administrators. Both amicus briefs support the State's position.

100, 10 S.Ct. 681, 34 L.Ed. 128 (1890). The Court held that the law ran afoul of the Commerce Clause's grant to Congress of exclusive authority to regulate commerce among the states. In response to Leisy, Congress passed the Wilson Act later that same year. The Wilson Act provided that alcoholic beverages shipped from out-of-state became subject to the laws of the receiving state upon arrival in that state.[3/]

The Supreme Court held that the Wilson Act was constitutional. See In re Rahrer, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891). However, the Court later ruled that the Wilson Act did not authorize application of state regulatory laws to liquor still in transit, and did not allow states to prohibit individuals from ordering liquor for personal consumption from

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[3/] The Wilson Act specifically provides:

> All ... intoxicating liquors ... transported into any State or Territory ... for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such ... liquors had been produced in such State or Territory....

27 U.S.C. § 121.

out-of- state vendors. See Rhodes v. Iowa, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438, 18 S.Ct. 674, 42 L.Ed. 1100 (1898).

In 1913, Congress closed these loopholes by passing the Webb-Kenyon Act, which was entitled "An act divesting intoxicating liquors of their interstate character in certain cases." The Webb-Kenyon Act prohibits the shipment or transportation of liquor into a state if the liquor is intended to be received, possessed, sold, or otherwise used in violation of the law of the receiving state. The Act specifically provides:

> The shipment or transportation, ... of any ... intoxicating liquor of any kind, from one State, ... into any other State ... which ... intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, ... is hereby prohibited.

27 U.S.C. § 122. In James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917), the Court stated that the purpose of the Webb-Kenyon Act "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." 242 U.S. at 324, 37 S.Ct. at 184.

The Twenty-first Amendment was ratified in 1933. In addition to repealing Prohibition, the Twenty-first Amendment in effect constitutionalizes the Webb- Kenyon Act. Section 2 of the Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712, 104 S.Ct. 2694, 2707, 81 L.Ed.2d 580 (1984) (citations and quotations omitted). Section 2 "represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product--intoxicating liquors." Castlewood Int'l Corp., 596 F.2d at 642.

B. Whether Florida has an implied right of action

The Webb-Kenyon Act does not explicitly provide that states may bring a cause of action in federal court to enforce its terms. Nevertheless, the State contends that it has an implied federal right of action under the Webb-Kenyon Act. The district court disagreed and so do we.

There is very little case law on this subject. One reported decision addresses this issue directly and was heavily relied upon by the district court. See Georgia v. Wenger, 94

F.Supp. 976 (E.D.Ill.1950), aff'd, 187 F.2d 285 (7th Cir.1951).[4]/ In Wenger, the State of Georgia brought a suit for damages in federal district court against an Illinois defendant who allegedly had shipped liquor to Georgia without paying Georgia taxes and warehouse charges. The defendant moved to dismiss for lack of jurisdiction, arguing that there was no federal question because Georgia's claims arose under state law. Georgia argued that it had a federal right under the Webb-Kenyon Act and the Twenty-first Amendment. The district court agreed with the defendant and found no right of action.

The district court in Wenger outlined the history and purpose of both the Twenty-first Amendment and the Webb-Kenyon Act. The district court noted that in passing the Twenty-first Amendment, Congress, the states, and the people of the United States intended "to place the states in position to put their respective policies relating to intoxicants into effect by state legislation without hindrance due to constitutional limitation applicable to ordinary articles of commerce." Wenger, 94 F.Supp. at 982. The Twenty-first Amendment also

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[4] Wenger predates modern implied right of action analysis, discussed infra; however, it is useful because it is on point.

"anticipated and rendered harmless a possible repeal of the Webb-Kenyon Act." Id. The district court stated that it found no authority that the Webb-Kenyon Act nor the Twenty-first Amendment gives rise to any legal right which will sustain a cause of action for damages. Accordingly, the district court concluded:

> Both by history and by judicial interpretation in the light of history the intended scope and purpose of [the Twenty-first Amendment and the Webb-Kenyon Act] is to divest liquor in interstate commerce of its interstate character so as to deprive it of all immunity from state control. Neither serves to give the states enforceable civil rights but only serves as enabling authority for broader state legislation relating to intoxicants.

Id. at 981-82. The Seventh Circuit affirmed, stating that the district court "correctly held that no cause of action of the nature asserted here arose under the [Twenty-first] Amendment or the Webb-Kenyon Act." Wenger, 187 F.2d at 287.

The State contends that Wenger is distinguishable because it involved a claim for monetary damages under the Webb-Kenyon Act, and here, by contrast, the State seeks injunctive relief only.[5/] This is a distinction without a

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[5/] We note, however, that even though the State seeks injunctive relief only under the Webb-Kenyon Act, its state law claims are for monetary damages.

difference. The analytical starting point is ascertaining whether Florida has an independent right of action under the Webb-Kenyon Act. If the State does, then--and only then--does the court reach the question of what remedies are available to the State. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65-66, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992)("As we have often stated, the question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place.")(quotation and citation omitted). Thus, we do not believe Wenger is distinguishable merely because it involved a claim for damages.[6]

The United States, as amicus, argues that West Virginia v. Adams Express Co., 219 F. 794 (4th Cir.1915), is a more appropriate precedent. In Adams Express, West Virginia brought an action in state court to enjoin Ohio defendants from direct-mailing liquor to West Virginia residents in violation of state law. The defendants removed the action to federal district

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[6]/ During oral argument, in response to a panel member's question regarding whether Wenger is distinguishable, counsel for the State was unable to provide the court with an adequate response other than the one mentioned in the brief and discussed infra.

court. The district court denied the injunction on the ground that the state law was invalid under the Commerce Clause. The Fourth Circuit reversed, holding that the Webb-Kenyon Act was "a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce." Id. at 801. Consequently, the state law was valid and entitled West Virginia to injunctive relief.

The State argues that Adams Express indicates that the Webb-Kenyon Act permits states to enforce their liquor laws in federal court. The Adams Express court, however, did not state that West Virginia had a right of action under Webb-Kenyon itself. The district court noted that the defendants invoked removal jurisdiction because "the suit is one arising under the Constitution or laws of the United States." 219 F. 331 (S.D.W.Va.1914). The court, unfortunately, did not elaborate because the state did not contest this basis for jurisdiction. Thus, the basis for subject matter jurisdiction in that case remains unclear.

In considering the State's contention that it has an implied right of action, we must consider the Supreme Court's pronouncement on this topic. The Court has set forth four

relevant factors to determine whether a statute implies a right of action:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975)(quotation & citations omitted). Subsequent decisions have clarified that the most important factor is whether Congress intended to create a cause of action. See e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); Collins v. FMHA- USDA, 105 F.3d 1366, 1367-68 (11th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 2528, 138 L.Ed.2d 1028 (1997). "Congressional intent to create a private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action." Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir.1997)(citing Touche Ross & Co. v. Redington, 442 U.S. 560, 570, 99 S.Ct.

2479, 2486, 61 L.Ed.2d 82 (1979)). The State and its amici argue that application of this analysis compels a ruling in Florida's favor. We disagree.

In considering the four Cort v. Ash factors, only the first one favors Florida's position: the Webb-Kenyon Act was enacted for the benefit of the states. The most important factor--Congressional intent--weighs against the State. The State cites no affirmative evidence that Congress intended the Act to create an independent cause of action enforceable in federal court. Indeed, the United States concedes in its amicus brief that "there is no express legislative history confirming the right of states to enforce Webb- Kenyon, ..." Br. of United States at 13.

Nor does it appear that the legislative history implicitly supports an independent cause of action under Webb-Kenyon. The United States' brief, for example, quotes one of the Act's sponsors, Senator Kenyon, as stating that the Act's "purpose, and its only purpose, is to remove the impediment existing to the States in the exercise of their police powers regulating the traffic or control of intoxicating liquors within their borders." Br. of United States at 5 (emphasis added). If the only purpose of the Act was to grant states authority to exercise their own

police powers, it follows that the Act did not also create a federal cause of action.

In addition, Congress passed the Reed Amendment in 1917, which originally banned the advertisement of liquor and provided for federal criminal enforcement of the Webb-Kenyon Act. Congress intended to "ma[ke] the liquor traffic a Federal offense in certain cases, instead of merely subjecting that traffic to the operation of State laws." H.R.Rep. No. 74-1258, at 3 (1935). From 1919 to 1933, the Webb-Kenyon Act and the Reed Amendment were superseded by the Prohibition laws. But in 1933, the Twenty-first Amendment became effective, ending Prohibition, and effectively constitutionalizing the Webb- Kenyon Act. In 1934, Congress amended the Reed Amendment to delete the provisions banning the advertising of liquor.

In 1936, Congress enacted the "Liquor Enforcement Act," which was an act "To Enforce the Twenty-First Amendment to the Constitution." See H.R. 8368, 74th Cong. (1936); 49 Stat.1928, ch. 815 (June 25, 1936). Section 3 of the new act made it illegal to import liquor into any state if (1) the state required a permit for the importation of the liquor, and the liquor was not accompanied by a permit, or (2) the state

banned the importation of alcohol altogether. See H.R. 8368, 7th Cong. § 3 (1936), codified at 18 U.S.C. § 1262. Section 9 of the new act repealed the Reed Amendment. See H.R. 8368, 7th Cong. § 9 (1936).

According to the committee report accompanying the new act, Congress intended to "relieve the States of federally imposed prohibition," H.R.Rep. No. 74-1258, at 4, and "conform [federal law] to the intent of the twenty-first amendment, that is, to avoid Federal prohibition laws which give the States more protection than they want." Id. at 8. Congress designed a system whereby

> the regulation of the liquor problem is to be left to the States, with the assurance that the Federal Government will afford them affirmative protection against violations directed from outside their borders.

H.R. Rep. 74-258, at 4. The idea was that if states provided the federal government with clear indications of what they wanted to keep out, the federal government would criminalize the importation of such items into the objecting states. See id. at 5.

The legislative history of the Webb-Kenyon Act demonstrates that if Congress had intended to provide a civil remedy for violations of the Act, then it could have done so

explicitly, as it did with criminal sanctions. The legislative history of the Reed Amendment, as well as the Webb-Kenyon Act, is ambiguous and is not "clear evidence" of an intent to create a federal civil cause of action. Baggett, 117 F.3d at 1345.[7]

Therefore, the first two Cort v. Ash factors do not support the implication of a right of action. We need not reach the other two factors. See Taylor v. Citizens Fed. Sav. & Loan Ass'n, 846 F.2d 1320, 1322 (11th Cir.1988)(citing California v. Sierra Club, 451 U.S. 287, 297-98, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981)).[8]/

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[7]/ We note that a bill was introduced in the House of Representatives last March titled, "A bill to amend the Webb-Kenyon Act to allow any state, territory, or possession of the United States to bring an action in federal court to enjoin violations of that act or to enforce the law of such state, territory, or possession with respect to such violations." This bill, which is still in committee, indicates at the very least that some members of the present Congress feel that the Congress which originally enacted the Webb-Kenyon Act did not provide states with a right of action.

[8]/ Assuming arguendo that we considered the other factors, they reinforce our conclusion that the Webb-Kenyon Act does not imply a federal cause of action. Considering the third factor, implying a right of action is not

The State urges this court to find an implied federal cause of action because it needs a federal forum to enforce its liquor laws. The Supreme Court, however, has rejected necessity as a rationale for implying a right of action. See Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979)("We need not reach the merits of the arguments concerning the 'necessity' of implying a private remedy and the proper forum for enforcement of the rights asserted by ... for we believe such inquiries have little relevance

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consistent with the underlying purpose of the Webb-Kenyon Act--to remove Commerce Clause objections to state liquor regulations. See, e.g., Craig v. Boren, 429 U.S. 190, 205-06, 97 S.Ct. 451, 461-62, 50 L.Ed.2d 397 (1976); McCormick & Co. v. Brown, 286 U.S. 131, 140-41, 52 S.Ct. 522, 526, 76 L.Ed. 1017 (1932); James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917). In fact, the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment worked together "to reinvigorate the State's regulatory role" with respect to alcoholic beverages. Craig, 429 U.S. at 205, 97 S.Ct. at 461. The aims of restoring authority to the states and providing a constitutional footing for state regulation are not consistent with creating a federal cause of action. Finally, the last Cort v. Ash factor militates against finding an implied federal right of action because states have historically taken the lead in the regulation of alcoholic beverages.

to the decision of this case."). The State offers no clear reason why it needs a federal forum.[9/] Additionally, states have been enforcing their liquor laws against out-of-state distributors in state courts for years. See e.g., Alcohol Div. of Dept. of Finance & Tax. v. Strawbridge, 258 Ala. 384, 63 So.2d 358 (1953); State v. Ward, 361 Mo. 1236, 239 S.W.2d 313 (1951).

Finally, the State argues that Webb-Kenyon is an "assimilated" act because it subsumes state liquor laws and thereby renders the violation of those laws a breach of federal law, as well. Florida relies upon United States v. Sharpnack, 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958), in which the Court upheld the constitutionality of the Assimilative Crimes Act of 1948 ("ACA"). The ACA criminalized and provided for the prosecution of any action on a federal enclave which would constitute a crime in the state where the enclave was located.

9/ At oral argument, in response to a question about why the State insists on federal jurisdiction, counsel for the State and the United States claimed that an injunction from a federal court would have more impact than a state court injunction. We find no merit to this argument because under the Full Faith and Credit Clause, a state court must give deference to another state court's order. See U.S. Const. art. IV, § 1.

That is, the ACA "assimilated" and federalized state criminal law on federal enclaves. Sharpnack challenged the ACA's inclusion of state criminal law enacted after the passage of the ACA. The Court noted that assimilative acts often incorporate future state legislation. The Court cited several examples, including the Webb-Kenyon Act. 355 U.S. at 294, 78 S.Ct. at 296. The State argues that under Sharpnack, the Webb-Kenyon Act must be read as "federalizing" state liquor laws.

We conclude that the Webb-Kenyon Act is not an assimilated act. The issue in Sharpnack was not whether the ACA or any other statute implied a right of action, but whether the ACA was constitutional. Also, to say that a particular statute is assimilative does not answer the question of whether it implies an independent right of action.

In conclusion, we hold the State does not have an implied federal cause of action under the Webb-Kenyon Act. Because the district court properly dismissed the State's complaint for lack of subject matter jurisdiction, we affirm the district court's judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, AND ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,

Plaintiffs,

v. Case No. TA 95-40462-WS

ROCHAMBEAU WINES AND LIQUORS, INC., THE CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, WINE CLUB SANTA ANA, INC., AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

Defendants.
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ORDER GRANTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Before the court are defendants Rechambeau Wines and Liquors, Inc., The California Wine Club, Passport Wine Club and Wine Club Santa Ana, Inc.'s motion to dismiss for lack of subject matter jurisdiction (document 9) and plaintiffs' (hereafter "the State of Florida or Florida") response thereto (document 20). The State of Florida has also submitted a notice of supplemental authority (document 31) to which defendants have responded (document 32). On April 29, 1996, the court heard argument from counsel on the motion to dismiss.

I. *BACKGROUND*:

The State of Florida has filed a five count complaint against the defendants[1] alleging that defendants are shipping into and selling alcoholic beverage products in the State of Florida in violation of federal and Florida law. Document 2 at ¶ 1.1. Count I of the complaint seeks to compel defendants to comply with the licensing requirements under Florida law for the sale of alcoholic beverages. Id. at ¶¶ 5.1 - 5.14. Count II seeks to compel the payment of excise taxes and license fees due under Florida law on the products defendants have shipped into the state. Id. at ¶¶ 6.1 - 6.7. Count III alleges a claim against defendants under the Florida Deceptive and Unfair Trade Practices Act. Id. at ¶¶ 7.1 - 7.6. Count IV seeks to compel the payment of sales taxes due under Florida law on the products defendants have shipped into the state. Id. at ¶¶ 8.1 - 8.7. Count V seeks injunctive relief on the above claims. Id. at ¶¶ 9.1 - 9.5.

The State of Florida asserts federal jurisdiction pursuant to Title 28, United States Code, Section 1331[2] and

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[1] Plaintiffs have voluntarily dismissed with prejudice their claims against defendants Zachy's Wine And Liquor, Ind., Stafford's Fine Wine And Specialty Co,. and Castlerock Wine Corp., d/b/a St. Helena Wine Merchants. *See* Documents 23, 27 and 28.

[2] The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331.

1337 (a)[3]. Document 2 at ¶ 2.2. Florida contends that its claim to compel defendants to comply with the alcohol beverage licensing requirements under Florida law (Count I) arises under Section 2 of the Twenty-First Amendment to the Constitution[4] and Title 27, United States Code, Sections 121 ("Wilson Act")[5] and 122 ("Webb-Kenyon Act")[6]. Document

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[3] The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 28 U.S.C. § 1337 (a).

[4] The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. amend. XXI, § 2.

[5] All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. 27 S.S.C. § 121.

[6] The shipment or transportation in any manner or by any means whatsoever or any ... intoxicating liquor or any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is

2 at ¶ 2.1. Florida avers that the court has supplemental jurisdiction over the claims alleged in Counts II through V pursuant to Title 28, United States Code, Section 1367 (a). Id. at ¶ 2.2.

Defendants move to dismiss the complaint for lack of subject matter jurisdiction alleging that the claims alleged in the complaint do not arise under the Constitution, laws, or treaties of the United States or any Act of Congress regulating commerce. Document 9 at p. 5. Defendants maintain that the allegations of the complaint are for violations of Florida's Beverage Law, Chapter 561.01 *et seq.*, Florida Statutes, and that neither the Twenty-First Amendment, the Wilson Act, nor the Webb-Kenyon Act create a right of action to recover for violations of the same. Id. at ¶ 4. Defendants also argue that Counts II through IV should be dismissed pursuant to the Tax Injunction Act, Title 28, United States Code, Section 1341. Id. at ¶ 5.

II. *Analysis:*

The central issue before the court is whether the Twenty-First Amendment, the Wilson Act, or the Webb-Kenyon Act, collectively, or in and of themselves, create a right of action on behalf of the State of Florida to sue in

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intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject tot he jurisdiction thereof, is hereby prohibited. 27 U.S.C. § 122.

federal court to compel defendants to comply with licensing requirements of Florida's Beverage Law. Like the parties, the court's research could find only one case which addressed the issue.[7] In that case, Georgia v. Wenger, 94 F.Supp. 976, 981 (E.D.I11. 1950) *aff'd* 187 F.2d 285 (7th Cir.) *cert. denied* 342 U.S. 822 (1951), the State of Georgia sued a resident of Illinois in a civil action in federal court to recover damages resulting from a conspiracy to violate the state's revenue laws. "The complaint alleged that defendant, with certain residents of the State of Georgia, conspired to ship and did ship and sell 79,000 gallons of intoxicating liquors from Illinois to the residents of Georgia, and that no warehouse fees or taxes imposed by the laws of Georgia were paid thereon...." 187 F.2d at 285. The State of Georgia asserted that federal jurisdiction existed pursuant to the Twenty-First Amendment and the Webb-Kenyon Act. The defendant moved to dismiss the complaint for, among other things, lack of federal jurisdiction. The district court ruled that neither the Webb-Kenyon act nor the Twenty-First Amendment conferred a civil remedy to recover damages for the transportation of liquor into the state in violation of state law. 94 F.Supp. at 981.

> By history and by judicial interpretation in the light of the history the intended scope and purpose of each [the Twenty-First Amendment and the Webb-Kenyon Act] is to

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[7] Most of the cases reviewed by the court concerned suits contesting the validity of state legislation governing the transportation, importation or regulation of liquor.

> divest liquor in interstate commerce of its interstate character so as to deprive it of all immunity from state control. Neither serves to give the states enforceable civil rights but only serves an enabling authority for broader state legislation relating to intoxicants.
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> The states... having legislated to that end, any rights accruing to the states whether in nature of a civil remedy or criminal action have their origin not in the Webb-Kenyon Act or in the Twenty-first Amendment that gave... them the power to legislate but in the legislation enacted in exercise of the power.

Id. at 94 - 95. On appeal, the Seventh Circuit affirmed the district court's holding concluding that no cause of action "arose under the [Twenty-First} Amendment or under the Webb-Kenyon Act." 187 F.2d at 287.

The State of Florida argues that the decision in Wenger is inapplicable to this case. Unlike the State of Georgia in Wenger, the State of Florida asserts that it is not alleging federal jurisdiction pursuant to the Twenty-First Amendment or the Wilson and Webb-Kenyon Acts to recover *damages* for defendants' violations of Florida's Beverage Law; rather, Florida says, federal jurisdiction exists pursuant to the above cited authority for *injunctive relief* to compel defendants to comply with the licensing requirements of Florida's Beverage Law. Document 20 at 8. The State of Florida argues that the Twenty-First Amendment and the Wilson and Webb-Kenyon Acts imply a federal right of action on the part of the State of Florida to compel defendants to comply with Florida law.

In evaluating a claim that a statute creates an implied right of action, the Supreme Court has articulated that the focus must be on the intent of congress when it enacted the statute in question. Transamerica Mortg. Advisors, Inc., v. Lewis, 444 U.S. 11, 15 (1979) (*"what must ultimately be determined is whether Congress intended to create the ... remedy asserted...."*); Daily Income Fund, Inc. v. Fox., 464 U.S. 523 (1984). Among the factors considered in discerning congressional intent, are (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) whether there was any indication of Congressional intent to deny or create a right of action (3) whether implication of a right of action is consistent with the underlying purpose of the statute, and (4) whether the matter is traditionally one relegated to the states. Cort v. Ash, 422 U.S. 66, 78 (1975); Thompson v. Thompson, 484 U.S. 174, 179 (1988).

Against this backdrop, the court determines that neither the Twenty-First Amendment, the Wilson Act, nor the Webb-Kenyon Act, collectively, or in and of themselves,[8] create a right of action for suit in federal court to compel compliance with state law. For one, the matter of regulating

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[8] Judicial interpretation has provided the Twenty-First Amendment, the Wilson Act, and the Webb-Kenyon Act with the same scope, meaning and purpose. Craig v. Boren, 429 U.S. 190, 205 (1976) (*"[t]he wording of § 2 of the Twenty-first amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes).*

the flow of alcohol is traditionally one relegated to the states. James Clark Distributing Co. v. Western Md. Ry Co., 242 U.S. 311, 332 (1917) (*prior to prohibition states possessed extraordinary police power over alcohol);* In the License Cases, 47 U.S. (5 How.) 504, 579 (1847) (*recognizing broad authority in state governments over trade in alcoholic beverages within their borders).* Second, the history surrounding the Wilson and Webb-Kenyon Acts and the Twenty-First Amendment demonstrate that the purpose behind the passage of the two Acts and the Amendment was to reinvigorate *the state's role* in alcohol regulation and move away from federal regulation of the same. Boren, 429 U.S. at 205 - 06; Duckworth v. Arkansas, 314 U.S. 390 (1941) (*purpose of the Webb-Kenyon Act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor contrary to state law);* United States v. State Tax Comm'n of Miss., 412 U.S. 363 (1973) (*amendment was intended to free the state of traditional commerce clause limitations when the state restricts the importation of intoxicants destined for use, distribution or consumption within its borders*); W.D.C., Inc. v. City of Jacksonville, 710 F.Supp. 782, 785 (M.D.Fla. 1989) *(Wilson Act enacted to provide express authority to the states to regulate imported alcohol) (Twenty-First Amendment returned power of regulating alcohol to the states and added power over interstate commerce not previously possessed)*; Battipaglia v., New York State Liquor Auth., 745 F.2d 166 (7th Cir. 1984) *(amendment was designed to end federal government control of drinking*

habits of all citizens and to place control of alcoholic beverages in the states; fulfillment of the latter required that full authority be given to the states to deal with the subject of intoxicating liquors free from any commerce clause concerns) cert. denied 470 U.S. 1027 (1985). Moreover, the intent behind the passage of the Acts and the Twenty-First Amendment support that Congress did not intend to create a federal right of action. The Webb-Kenyon act originally contained a provision providing for federal enforcement of its terms; this federal enforcement section, however, was repealed by Congress in 1936 leaving no provision, either civil or criminal, for enforcement under the act. Wenger, 94 F.Supp. at 980. Likewise, the Twenty-First Amendment, as originally proposed, contained three substantive sections, the third of which provided:

> Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong.Rec. 4138 (1933). "Section three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of importation of liquor to the states." Castlewood Intern. Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979); W.D.C., Inc., 710 F.Supp. at 788 - 89.

III. *Conclusion*:

Congress passed the Wilson and Webb-Kenyon Acts and proposed the Twenty-First Amendment in an attempt to place the regulation of alcoholic beverages back with the states. In this sense, the Acts and Amendment do not create a federal right of action but serve as enabling authority for the states to regulate the flow of alcohol into their respective borders without federal commerce clause concerns. The State of Florida has not alleged a claim arising under the Constitution, laws, treaties of the United States or under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies; rather Florida has alleged claims seeking reprieve for violations of *state law*. Thus, this court does not have federal subject matter jurisdiction and this case must be dismissed.

Accordingly it is ORDERED:

1. Defendants motion to dismiss (document 9) is GRANTED.

2. This cause is DISMISSED for lack of subject matter jurisdiction. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 2nd day of May, 1996.

s/
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO, and ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,

vs. Case No. TCA 95-40462-WS

ROCHAMBEAU WINES AND LIQUORS, INC., THE CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, WINE CLUB SANTA ANA, INC., AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that this action be **DISMISSED** for lack of subject matter jurisdiction.

Dated May 3, 1996, at Tallahassee, Florida.

ROBERT A. MOSSING, CLERK
s/_____
By Deputy Clerk: PAM KUMINKOSKI

ENTERED ON DOCKET 5/3 BY PK
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)
Copies mailed to: Klein, Taylor, Dean, Wright, Cohen, Goldstein, Hartmann, Young, COB 1996

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, AND ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS

Plaintiffs,

v. **CASE NO: 96-3602**

SAM'S WINES & LIQUORS, SOUTH AFRICAN WINE CLUB, INTERNATIONAL HOUSE OF WINE & CHEESE, AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

Defendants.

_____/

AMENDED
ORDER GRANTING MOTION TO DISMISS

THIS MATTER came to be heard on Motions to Dismiss filed by Sam's Wines & Liquors, Inc. and South African Wine Club and the Court, having heard argument of counsel and being otherwise fully advised in the premises, hereby finds:

1. In order for a nonresident defendant to be subject to the jurisdiction of a Florida court, two criteria must be met: first, the complaint must set forth sufficient

jurisdictional facts to bring the defendant within the purview of Florida's long-arm statute, F.S. 48.193 and, secondly the defendant must possess certain minimum contacts with the state of Florida sufficient to satisfy the Fourteenth Amendment due process requirement of the United States Constitution. Flight International Aviation Training Center v. Rivera, 651 So.2d 1265, 1266 (Fla. 1DCA 1995).

2. It is undisputed that Sam's Wines & Liquors is an Illinois corporation with its sole place of business at 1000 West North Avenue, Chicago, Illinois. Sam's owns no real or tangible property in the state of Florida, does not have any employees or agents within the state of Florida and does not operate, conduct or transact business in Florida. Sam's utilizes telephone number (312)664-7037 for the receipt of telephone orders and, with any such telephone orders taken, Sam's purchase and shipping policy clearly reflects that title to the product passes to the purchaser in Illinois. See F.S. 672.401(2). Sam's is alleged to have engaged in a single sale of alcoholic beverages involving a resident of the state of Florida.

3. It is undisputed that South African Wine Club is a sole proprietorship located at Huntington Beach, California. It has no offices, employees or agents in Florida. South African Wine Club's only connection with Florida is when individuals in the state call or write to South African Wine Club's office in California to order wine. Title to any wines so ordered from South African similarly passes to the customer in California.

4. It is undisputed that South African has done approximately $3,500 in business in Florida, less than .5% of South African's total revenues for the period. It has not actively solicited Florida customers having twice chosen to advertise in national wine publications and once in a newsletter directed towards South Africans living in the United States. The only time it intentionally advertised in

Florida was in connection with a newsletter published by South Africans living in Florida in which newsletter, South African Wine Club bought one advertisement.

5. An agent from the Division of Alcoholic Beverages and Tobacco placed an order with Sam's Wines for two 750 milliliter bottles of Scotch which was paid for by a credit card transaction in which title passed in the state of Illinois. The products were subsequently delivered by purchaser's agent, to purchaser in Leon County.

6. An agent for the Division similarly purchased three 750 milliliter bottles of wine from South African for $25 in a credit card transaction in which title passed in California with the wines subsequently shipped by purchaser's agent, to purchaser in Leon County.

7. It is found based upon the complaint and the motions to dismiss that insufficient jurisdictional facts have been alleged to place defendant South African Wines and Sam's Wines & Liquors within the purview of Florida's long-arm statute, F.S. 48.193.

8. It is further found based upon the complaint and motions to dismiss that defendants South African Wines and Sam's Wines lack the necessary minimum contacts with the state of Florida sufficient to satisfy the Fourteenth Amendment due process requirement of the United States Constitution.

9. Finally, even if personal jurisdiction over the defendants existed, which it does not, based upon the complaint and motions to dismiss the Court finds that under the rationale of Department of Revenue v. Share International, Inc., 676 So.2d 1363 (sic 1362) (Fla. 1996) that the Defendants South African Wines and Sam's Wines & Liquors lack the "substantial nexus" with the state of Florida which must exist as a necessary precondition to the

imposition of a requirement to collect and remit Florida excise taxes.

Based upon the foregoing findings, it is hereby

ORDERED AND ADJUDGED that:

1. Defendant Sam's Wines & Liquors' and South African Wines' Motions to Dismiss be and the same are hereby GRANTED with prejudice; and

2. Having granted the Motion to Dismiss, this case shall be and the same is hereby dismissed.

DONE AND ORDERED *nunc pro tunc* this 8th day of December, 1997, at Tallahassee, Leon County, Florida.

/s/
GEORGE S. REYNOLDS, III
CIRCUIT JUDGE

Copies furnished to:

Thomas A. Klein, Esq.
Eric J. Taylor, Esq.
Robert Wright, Esq.
J. Riley Davis, Esq.
Harold F. X. Purnell, Esq.
Mort Siegel, Esq.